No. 82-1071

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,
and
PETER JOHNSON, as Administrator of the BONNEVILLE POWER ADMINISTRATION, Department of Energy, and DONALD PAUL HODEL, as Secretary of the DEPARTMENT OF ENERGY, and the UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents argue that under the Regional Act[1] Congress intended preference to govern BPA's disposition of all power, including power Congress itself committed to nonpreference customers under statutorily mandated contracts. This argument would overturn the meaning consistently accorded preference under the Bonneville Project Act ("Project Act"),[2] whose preference provisions the Regional Act reaffirmed. Preference has never governed rights to power already committed by contract, but rather the administrative allocation of uncommitted power that is insufficient to meet the "conflicting or competing" applications of preference and nonpreference customers. Moreover, Respondents' view of preference would make nonsense of the structure and purposes of the Regional Act, in which Congress specified power commitments for nonpreference customers precisely to insure a different allocation of power than would have been possible under preference rules alone. Because preference does not govern power already committed by contract, Respondents' preference arguments are irrelevant; the sole issue is whether BPA reasonably interpreted those Regional Act provisions specifying the contents of the DSIs' mandated contracts.

Respondents further argue that Congress did not commit the disputed power to the DSIs; they argue that the Regional Act contemplates simple renewal of the DSIs' pre-Act contracts, under which BPA could interrupt delivery of this power to the DSIs "at any time." Respondents urge that the notion of an equivalent "amount of power" referenced in the Act requires the new DSI con-

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[1]Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act"), Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980).

[2]Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832l (1976 & Supp. V 1981).

tracts to contain not only the same "amount of power" provisions as the DSIs' pre-Act contracts but the same "interruption rights" provisions as well. This argument is grammatically untenable, cannot be reconciled with the distinction between "amount of power" and "interruption rights" that characterized the DSIs' pre-Act power commitment and was carried forward in the Regional Act, and would defeat Congress's express statutory limitation on BPA's interruption rights under the new DSI contracts.

Congress committed the disputed power to the DSIs in order to effectuate the Regional Act's rate subsidy program for residential consumers, and to achieve other important regional power benefits. Diversion of the disputed power from the DSIs to Respondents would nullify Congress's plan and jeopardize these goals. BPA, the agency charged with implementing this plan, reasonably interpreted its statutory mandate under the governing legal standard.

II.

THE DSIS' RIGHT TO POWER IS GOVERNED BY REGIONAL ACT PROVISIONS SPECIFYING THE CONTENTS OF THEIR MANDATED CONTRACTS AND NOT BY PREFERENCE

1. Preference Has Never Governed Rights to Committed Power and Is Therefore Irrelevant to the DSIs' Statutory Power Commitment

Seeking refuge in the "plain language" of Sections 5(a) and 10(c), Respondents argue that by reaffirming preference Congress intended all power under the Regional Act—including power committed to nonpreference customers under statutorily mandated contracts—to be subject to claim at any time by preference utilities.[3] This flies squarely in the face of the Project Act's preference provisions, which through Section 5(a) govern preference under the Regional Act. These Project Act provisions expressly make all BPA contracts—including contracts with non-

[3] *See, e.g.*, CL Brief at 18-20 and PPC Brief at 7, 19-20.

preference customers—binding for their duration in accordance with their terms, even if power shortages arise.[4] Preference has never permitted the usurpation of power lawfully committed to nonpreference customers.[5] Rather, preference governs the administrative allocation of uncommitted power that is insufficient to meet the "conflicting or competing" applications of preference and nonpreference customers.[6] Thus, historically preference has only limited an agency's authority to offer contracts to nonpreference customers in the first instance. If there is sufficient power for all customers, there are no "competing applications" and the agency's contracting authority is not constrained by preference; contracts with nonpreference customers lawfully may be executed and become binding.[7]

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[4]16 U.S.C. § 832d(a). Congress applied this provision to all mandated contracts. 16 U.S.C. § 839c(g)(1). *See* Regional Solicitor's Opinion, October 31, 1974 (BPA must honor DSI contracts despite later power requests from preference utilities); 16 U.S.C. § 839c(a).

[5]*Id.* The preference inquiry ends if contracts with nonpreference customers were lawful when offered. *See City of Anaheim v. Duncan*, 658 F.2d 1326 (9th Cir. 1981), *City of Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978); *Volunteer Electric Coop. v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd mem.*, 231 F.2d 446 (6th Cir. 1956); *Arkansas Power & Light Co. v. Schlesinger*, No. 79-1263 (D.D.C. 1980) (copy of opinion lodged with Court). *See* DSI Brief at 14 & n.32, and n.7, *infra*.

[6]16 U.S.C. § 832c(b). "[W]hen there is no shortage, the preference clause slumbers on the shelf unused." BPA, *Final Environmental Impact Statement* (DOE/EIS-0066) ("EIS") App. C at III-6 (Dec. 1980). *See also* Western Area Power Administration, *1982 Annual Report* 22 (power is allocated when applications exceed supplies, but power already committed by contract is not available for allocation); DSI Brief at 13-15, 41-44.

[7]Absent mandated contracts, the lawfulness of nonpreference customer contracts depends on the agency's determination that it will have sufficient power to meet the foreseeable needs of preference utilities while performing the nonpreference customer contracts. *See* nn.4 & 5, *supra*. If that determination was reasonable at the time, those contracts become binding even if preference utilities later apply for the same power. *Id.*

In the Regional Act Congress committed power directly to BPA's nonpreference customers under mandated contracts.[8] Such contracts are perforce "lawful," and hence immune from preference challenge.[9] The issue is not preference, but whether BPA reasonably construed those statutory provisions prescribing the DSI contracts. If BPA's construction was reasonable then the disputed power was statutorily committed to the DSIs and is not governed by preference; if BPA's construction was not reasonable then the disputed power was not committed to the DSIs and is governed by preference. Either way, the point of departure must be the terms of the statutory commitment itself, not preference.[10] Preference continues to govern BPA's

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[8]16 U.S.C. §§ 839c(g)(1), 839c(d)(1)(B). Congress consistently described these contracts as "required." *See* DSI Brief at 16 n.36. That Congress mandated these contracts distinguishes this case from every preference decision relied on by Respondents and the Ninth Circuit. This emphasizes that there is no national preference policy. *See* DSI Brief at 1, 14-15 & n.33, 41-44.

[9]Congress has plenary authority to dispose of federal power. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330-33 (1936). This authority is unfettered by preference, a statutory mechanism that guides agencies in exercising authority delegated by Congress. Because preference does not affect power committed by statute, Congress described the Regional Act as a "legislative allocation of Federal power" even after reaffirming preference. *House Commerce Report*, at 31 [Cert. A., at D-72].

[10]The Private Utility Respondents concede that the decision below must be reversed if Congress committed the disputed power to the DSIs, but argue that absent such commitment all nonfirm power in excess of preference utility demands must be divided equally between the nonpreference DSIs and private utilities. Private Utility Brief at 3 & n.7. The division of uncommitted power among nonpreference customers is not before the Court and was not raised below. The Private Utility Respondents never challenged the new DSI contracts and are now barred from doing so. 16 U.S.C. § 839f(e)(5). *See also* DSI Brief at 18-19 & nn.51-52.

disposition of all power not committed under those contracts.[11]

That Congress mandated contracts with nonpreference customers is sufficient to preclude any preference challenge to those contracts. To render this result beyond dispute, when Congress added Section 5(a) to the Regional Act reaffirming preference it simultaneously added Section 5(g)(7) "deeming" BPA to have sufficient power for all mandated contracts.[12] By this legal fiction Congress demonstrated Section 5(a)'s irrelevance here: given sufficient power, all mandated contracts are lawful and protected from preference challenge.[13]

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[11]Preference governs the sale of power that is surplus to BPA's Regional Act contract obligations. *See* p. 6 & n.15, *infra*. In addition, preference will govern BPA's offer of future contracts to nonpreference customers, which may be executed only if BPA has sufficient power for all customers. *See* DSI Brief at 16 & n.37, 36 n.106.

[12]16 U.S.C. § 839c(g)(7). *See* DSI Brief at 16 n.39.

[13]*See* pp. 2-3, *supra*. *See House Commerce Report*, at 64 [Cert. A., at D-126 to D-127]:

> "Section 5(g)(7) is intended to ensure that a challenge (on the basis that the Administrator lacks legal authority on account of insufficient power resources) to the initial contracts required to be offered under this Act will not be sustained."

It is disingenuous for Respondent PPC to suggest this means anything other than protecting the initial contracts from preference challenge, PPC Brief at 17, because an "insufficiency of power" is the basis for any preference challenge and was expressly relied on below. *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708, 712 (9th Cir. 1982).

By conceding that Section 5(g)(7) protects the offer of mandated contracts to nonpreference customers, Respondents concede Section 5(a)'s irrelevance here; once lawfully offered, BPA's contracts are not governed by preference. Both the Ninth Circuit and Respondent Central Lincoln misinterpret Section 5(g)(7) as providing the DSIs only "what they got before" the Regional Act. CL Brief at 31; 686 F.2d at 712 n.4. However, Section 5(g)(7) by its terms only protects the mandated contracts from preference challenge; it does not purport to specify their contents. Mandated contracts may contain whatever provisions Congress prescribes.

This conclusion is unaffected by Section 10(c), which preserves the preference provisions of all "other" federal power marketing laws.[14] Section 5(f) of the Regional Act expressly precludes BPA from marketing power under any other law unless such power is surplus to BPA's Regional Act contract obligations.[15] Section 10(c) does not purport to establish those contract obligations.

Respondents' corollary arguments merely vary their principal argument. Respondents contend that the disputed contract provisions violate preference by "reversing" BPA's long-standing "marketing priorities" for nonfirm power. Respondents further argue that BPA changed positions, stating prior to passage of the Regional Act that preference was to be preserved but then committing nonfirm power to the DSIs after the Act became law.[16]

These arguments cannot be sustained. The disputed contract provisions do not "reverse" BPA's priorities for the use of nonfirm power because BPA has always used nonfirm power first to meet its contract obligations, not for sale to preference utilities.[17] Prior to the Regional Act, Respondents received the disputed nonfirm power because

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[14]16 U.S.C. § 839g(c).

[15]16 U.S.C. § 839c(f). Because under the Regional Act's mandated contracts BPA has no obligation to sell nonfirm power to preference utilities, 16 U.S.C. § 839c(b)(1), those utilities buy nonfirm power only when it is surplus to BPA's contract obligations under Section 5(f). *See* DSI Brief at 27 & n.83. Congress refused to delete Section 5(f) despite objections by *amicus* American Public Power Association that this section would subordinate all BPA power sales to BPA's new Regional Act contract obligations. *Pacific Northwest Power Supply and Conservation Act: Hearings on S. 2080 and S. 3418 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 1069 (1978). The Opinion below does not mention Section 5(f). *See* DSI Brief at 19-20, 23-24, 26-27, 29 & n.90.

[16]CL Brief at 14-15; APPA Brief at 13-18.

[17]EIS, *supra* n. 6, at IV-71 [JA 29]. *See* DSI Brief at 38 n.108.

that power had not been committed to the DSIs under their 1975 contracts and hence was governed by preference. In the Regional Act, Congress committed nonfirm power to the DSIs and thus created a new contract obligation that BPA was required to meet. The disputed contract provisions simply reflect this change in BPA's contract obligations, and occasion neither a change in BPA's priority use of nonfirm power nor a reversal of BPA's pre-Act position regarding preference.[18]

Respondents also argue that if Congress had intended an "exception" to preference it would have declared so "unambiguously."[19] Congress did not "unambiguously" declare an "exception" to preference because it created none; Congress committed power to nonpreference customers directly and reaffirmed preference to govern all remaining power. Congress intended that both actions be given effect.[20]

2. Respondents' View of Preference Cannot Be Reconciled With the Regional Act's Structure and Purposes

Most fundamentally, to argue that preference governs power under statutorily mandated contracts is to deny significance to those contracts and nullify the legislative allocation of power that was the Regional Act's very purpose.

While conceding that the Regional Act "obligates" BPA to offer contracts to nonpreference customers,[21] Respon-

[18] From 1978 onward BPA and Congress consistently agreed that BPA would serve the DSIs exactly as set forth in the disputed contract provisions. *See* DSI Brief at 28-34. Those provisions are taken from the Regional Act and the Congressional committee reports, not from BPA's post-Act statements. *Id.*

[19] 686 F.2d at 713; CL Brief at 23-24. Unlike the Ninth Circuit, Respondents at least concede that statutory power commitments to nonpreference customers are valid without an "explicit exception" to preference. PPC Brief at 15. *See* DSI Brief at 41-44.

[20] *See* DSI Brief at 34-35 & n.103 (citing remarks of Senator Jackson and committee reports).

[21] *See, e.g.*, CL Brief at 30.

dents nonetheless advance a concept of preference that would interdict those "obligations" and strip the contracts of meaning. The notion that preference governs power committed by contract violates not only the Project Act's preference provisions[22] but also the most fundamental principles of contract, which presuppose binding obligations and enforceable rights. Respondents do not even suggest what possible meaning could have been intended for the mandated contracts if preference governs power committed thereunder. Indeed, although Respondents limit discussion to the DSIs' one quartile of nonfirm power, their concept of preference necessarily would extend to the DSIs' three quartiles of firm power and all power supplied to nonpreference private utilities and federal agencies,[23] thereby denying significance to Congress's specification of mandated contracts for these customer classes.

Respondents' view of preference also would render pointless the statutory provisions that protect preference utilities by requiring BPA to retain contract rights to withdraw power or interrupt nonpreference customers. For example, to insure against power deficits that might harm preference utilities, Congress required that contracts with private utilities include a provision allowing BPA to withdraw power on five years' notice.[24] Similarly, Congress required that BPA retain contract rights to interrupt DSI power for the protection of BPA's "firm loads."[25] These statutory provisions would be without

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[22]16 U.S.C. § 832d(a). *See* pp. 2-3 *supra*.

[23]*See* 16 U.S.C. §§ 839c(g)(1), 839c(b)(1)-(3), 839c(c). In addition to changing the DSIs' power commitment, Congress in the Regional Act also changed the power commitments of other nonpreference customers. *See* DSI Brief at 15-18.

[24]*See* 16 U.S.C. § 839c(b)(2).

[25]16 U.S.C. §§ 839c(d)(1)(A), 839a(17).

purpose if preference utilities already enjoyed the unfettered right to invade nonpreference customer contracts at will.[26]

Nor can Respondents' view of preference be reconciled with the avowed purposes of the Regional Act, in which Congress sought to provide residential consumers with low cost power and BPA with additional revenues.[27] The Regional Act addresses these issues by committing power to all BPA customers and requiring the DSIs to subsidize residential consumers. If, as Respondents contend, preference utilities enjoy a superseding right to all power, then Congress's power commitments are rendered meaningless and the Act's regional goals become subordinated to the interests of a single customer class.[28]

Respondents do not and cannot dispute that while reaffirming preference Congress simultaneously required BPA to offer contracts to nonpreference customers and specified the power committed under these contracts. What permits these statutory provisions to be harmonized in a manner that gives effect to each is the established role of preference: to govern administrative priorities in the allocation of uncommitted power. Because preference does not govern committed power, Respondents' arguments regarding preference are irrelevant in determining whether BPA reasonably interpreted the Regional Act provisions specifying DSIs' power commitments.

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[26]Nor could such preference rights be reconciled with Regional Act limitations on preference utility contracts. 16 U.S.C. §§ 839c(b)(1), 839c(b)(4)-(6).

[27]Contrary to Respondents' suggestions, the purposes of the Regional Act cannot be reduced to BPA's new power purchase authority, nor does the validity of the mandated contracts depend on BPA's exercise of that authority. *See* DSI Brief at 15-18, 36; pp. 16-19 *infra*.

[28]Respondent PPC argues that preference must be "strictly construed" but relies on cases not involving statutory power commitments for nonpreference customers. PPC Brief at 11. Where Congress has committed power to nonpreference customers, those commitments have been honored despite preference. *See* DSI Brief at 41-44.

III.
CONGRESS DID NOT SIMPLY RENEW THE DSIS' PRE-EXISTING POWER COMMITMENT

1. The Regional Act Provides the DSIs the Same "Amount of Power" As Under 1975 Contracts But Changes BPA's Rights to Interrupt that Power and Thereby Changes the DSIs' Power Commitment

Because DSI power is interruptible, it can be used to provide reserves. Thus, the DSIs' power commitment has always been a function of two separate components:

(1) "power quantity," expressed as an "amount of power" measured in kilowatts; and

(2) "power quality," expressed in terms of BPA's rights to interrupt portions of that power.

Bifurcation of the DSIs' power commitment into "quantity" and "quality" components was incorporated in the DSIs' 1975 contracts and carried forward in the Regional Act.[29]

Under the 1975 contracts each DSI's "amount of power" was expressed as a number of kilowatts. BPA's interruption rights were set forth in a separate section labeled "Restriction of Deliveries." BPA was obligated to make "continuously available" to each DSI its specified "amount of power," except when authorized to interrupt portions of that power. The 1975 contracts permitted BPA to interrupt the DSIs' first quartile power for any purpose, but only upon payment of "availability credits" to the DSIs.[30]

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[29] *See* DSI Brief at 11-12, 23-28 & n.86.

[30] *See* DSI Brief at 11-12, 24-26. Had the Ninth Circuit addressed the "amount of power" and "availability credit" provisions of the 1975 contracts, it would have realized that prior to the Regional Act Respondents received the disputed power *not* because this power had never been "initially allocated" to the DSIs, but because under the terms of the DSIs' 1975 contracts this power once allocated could be interrupted "at any time." *Id.* at 37-40. Respondents also fail to address these provisions.

Section 5(d)(1)(B) of the Regional Act provides each DSI an "amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power'."[31] Accordingly, the "Amount of Power" provisions of the new contracts provide each DSI the same number of kilowatts as under its 1975 contract.[32] Section 5(d)(1)(A) of the Regional Act requires the DSIs to provide "reserves for firm power loads," and Section 3(17) defines "reserves" as power available to BPA through "specific contract provisions" permitting BPA to "interrupt" DSI power to avert shortages for BPA's "firm power customers."[33] Accordingly, the new contracts obligate BPA to make "continuously available" to each DSI its full "amount of power," except when authorized under the "Restriction of Deliveries" provisions to interrupt that power for the protection of BPA's "firm power loads."[34]

Respondents argue that the Regional Act simply renews the DSIs' 1975 power commitment and that the disputed contract provisions—which limit to the protection of "firm power loads" the purposes for which DSI first quartile power may be interrupted—violate this mandate by providing the DSIs a greater "amount of power."[35] Respon-

[31]16 U.S.C. § 839c(d)(1)(B).

[32]*See* DSI Brief at 24-26. TVA contracts also measure "amounts" of industrial power in kilowatts. *See* TVA, *1979 Annual Report* Vol. II, App. 245-46; *see also* 16 U.S.C. § 836(b)(3) (committing "445,000 kilowatts" to industries under the Niagara Redevelopment Act).

[33]16 U.S.C. §§ 839c(d)(1)(A), 839a(17).

[34]*See* DSI Brief at 24-26, 28-31; § 14(i) of the new DSI contracts, IX COR 3835 [Cert. A., at H-10 to H-11].

[35]Respondents did not challenge below the "amount of power" provisions of the new DSI contracts, but only the interruption provisions. *See* DSI Brief at 24-26. In order to conform its argument to the Ninth Circuit's Opinion, Respondent Central Lincoln now asserts that these interruption provisions are "irrelevant." CL Brief at 22-23. This assertion is wrong; interruption rights remain the issue. *See* n.30 *supra*.

dents contend that the notion of an equivalent amount of power referenced in Section 5(d)(1)(B) means that the new DSI contracts must contain not only the same number of kilowatts as the 1975 contracts, but also the same interruption provisions.[36]

Respondents' argument cannot be reconciled with the language and structure of the statutory provisions establishing the DSIs' power commitment. Section 5(d)(1)(B) provides each DSI an "amount of power." Nothing in Section 5(d)(1)(B) refers to "interruptions" or "reserves," nor suggests that the "amount of power" concept suddenly has been expanded to encompass both number of kilowatts and interruption rights. On the contrary, straightforward construction establishes that "amount of power" continues to mean what it has always meant: a specified number of kilowatts.[37] Respondents' contention that Section 5(d)(1)(B) was intended to freeze BPA's pre-Act interruption rights is grammatically preposterous and strips Sections 5(d)(1)(A) and 3(17) of all function. These provisions expressly refer to "reserves" and, by limiting DSI power interruptions to the protection of BPA's "firm power loads," unarguably change BPA's pre-Act right to interrupt the DSI

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[36]Section 5(d)(1)(B)'s reference to "industrial firm power" does not support Respondents' argument. "Industrial firm power" refers to the grade of power supplied the DSIs under the 1975 contracts; the contracts themselves provided separately for the "amount of power" and "interruption rights" components of the DSIs' power commitment. *See* DSI Brief at 11-12, 23-28 & n.86. Moreover, Section 5(d)(1)(B) simply references the "industrial firm power" contracts in order to identify which of the two contracts held by the DSIs at the time of the Regional Act established the "amount of power" under their new contracts. *See* EIS, *supra* n.6, at IV-79 to IV-88.

[37]Kilowatts measure load size. That Congress equated DSI "amounts" of power with DSI load size and not with BPA's interruption rights is made explicit in Section 5(d)(3) of the Regional Act, which authorizes BPA to increase DSI "loads" by selling the DSIs increased "amounts" of power. 16 U.S.C. § 839c(d)(3).

first quartile for any purpose.[39] By changing the "power quality" component of the DSIs' power commitment Congress changed that commitment itself.[39]

2. The Regional Act's Legislative History Supports BPA's Statutory Interpretation

Congress's intent to change DSI service is confirmed by the Regional Act's legislative history.[40] To support their contrary arguments, Respondents rely primarily on the Congressional testimony of the DSIs' counsel that the Regional Act provides the DSIs with "lower power quality."[41]

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[38]16 U.S.C. §§ 839c(d)(1)(A), 839a(17). *See* DSI Brief at 11-12, 24-26. The Private Utility Respondents assert that BPA's interpretation "would be entitled to more weight" had Congress stated that "reserves" meant "power needed to protect the *customers' firm loads*" or that the reserves could be used "*only* for firm loads." Private Utility Brief at 16 & n.37 (emphasis in original). *See also* CL Brief at 35-36. In fact, in amending the legislation to define the term "reserves" the Senate Energy Committee made these very statements:

> "In this section, the term 'firm power customers of the Administrator' is intended to mean the firm power loads of such customers. It is not intended that the Administrator's reserves will be used to protect other than firm loads."

Senate Report, at 23 [Cert. A., at F-47 to F-48]. *See* DSI Brief at 28-31.

[39]Had Congress intended simple renewal of the DSIs' pre-existing contracts, it easily could have so declared rather than detailing the terms of those contracts. *Compare* 43 U.S.C. § 617d(b) (Boulder Canyon Project Act, requiring contract "renewals" without specifying contract provisions) *with* 16 U.S.C. §§ 839c(d), 839c(g), and 839e(c) (Regional Act, specifying DSI contract terms in detail).

[40]Respondents incorrectly assert that the DSIs' position depends on legislative history; in fact, it rests on the statutory provisions set forth above, *see* DSI Brief at 23-27, all but one of which Respondents would ignore.

[41]Respondents fail to address most of the legislative history, including the Senate committee's explanation of the term "reserves" and BPA's 1978 analysis of the legislation's DSI service provisions. *See* nn.18, 38, *supra*.

This testimony does not support Respondents' contention; it concerns BPA's new Regional Act right to interrupt the DSIs' *second* quartile,[42] which reduces the DSIs' pre-Act "power quality" by exposing an additional quartile of power to interruptions.[43] These new second quartile interruption rights, though not at issue here, bear upon analysis of the disputed contract provisions for two reasons. First, Congress sought to increase the DSIs' *average availability* of power in order to effectuate the Regional Act's comprehensive rate provisions; by limiting to the protection of "firm power loads" the purposes for which BPA could restrict the DSIs' first quartile, Congress intended to achieve this increase notwithstanding that other portions of DSI power would be exposed periodically to new interruptions.[44] Second, that the Regional Act mandates new and different interruption provisions for the second quartile demonstrates that Congress did not intend simple renewal of the DSIs' existing contracts.

Mimicking the Ninth Circuit, Respondents further argue that the Senate Report demonstrates that Congress intended to supply the DSIs' first quartile not with nonfirm power but only with firm power "borrowed" from future years ("shifted FELCC"), and to maintain the DSIs' pre-Act power availability.[45] Both Respondents and the Ninth Circuit ignore one of the Report's key phrases: the first

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[42]*See* DSI Brief at 10 & n.17, 33-34 & n.99.

[43]BPA's new second quartile interruption rights protect BPA's firm loads from shortages caused by power plant delays and conservation shortfalls, and are described in the same Congressional committee reports that describe BPA's new first quartile interruption rights. *See, e.g., House Interior Report,* at 48 [Cert. A., at E-106 to E-107]; DSI Brief at 30-31, 33 n.99.

[44]*See* DSI Brief at 29-34 & n.99, 47 & n.120; *see also* pp. 16-17, *infra.* Hence, DSI witnesses emphasized the Regional Act's treatment of "all our loads as firm except when interruptions are necessary to protect other firm loads. . . ." [Cert. A., at 0-4].

[45]686 F.2d at 713-14 n.7. *See* DSI Brief at 40 n.111.

quartile is to be "served with resources which are in excess of critical planning amounts. . . ."[46] By definition, this means service with nonfirm power.[47] Moreover, the Report's projection of 96% average power availability for the full DSI load demonstrates Congress's intention to increase the DSIs' pre-Act service[48] and supply them with nonfirm power: 96% average power availability for the full DSI load is mathematically unattainable using shifted FELCC alone to serve the first quartile.[49]

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[46]*Senate Report*, at 59 [Cert. A., at F-74].

[47]*See* DSI Brief at 7-8, 31-34. Firm power borrowed from future years ("shifted FELCC") is not a resource "in excess of critical planning amounts," but rather is the resource to which "critical planning amounts" refers. *Id.* Moreover, service with shifted FELCC in itself contradicts Respondents' theory that Congress intended simple renewal of the DSIs' pre-Act contracts: BPA did not serve the DSI first quartile with shifted FELCC prior to the Act. XXVI COR 6920, 6921-22.

[48]*See* DSI Brief at 31-34. Respondent Central Lincoln argues that the Report contemplates "continuation" of historic DSI service levels ranging as low as 85%. CL Brief at 38. This is incorrect. The Report specifically assumes a BPA power shortage through 1985 and therefore projects 85% power availability until 1985, but 96% availability in each year thereafter. *Senate Report*, at 59 [Cert. A., at F-74].

[49]Mathematically, 96% power availability for the full DSI load requires at least 84% availability for the first quartile. At best, shifted FELCC is available to serve the DSI first quartile for a few months each year, not for 84% of the year (10 months). *See* 1981 Operating Agreement, VIII COR 2266, 2271.

IV.

CONGRESS INTENDED THE DISPUTED CONTRACT PROVISIONS TO ACHIEVE IMPORTANT REGIONAL POWER SUPPLY AND COST BENEFITS

1. Supplying the DSI First Quartile With Nonfirm Power Effectuates the Regional Act's Rate Subsidy Program for Residential Consumers

The Regional Act created a rate subsidy program for residential and farm consumers to end wholesale rate disparities within the Northwest.[50] This program forces BPA to incur a revenue loss, which under the Act must be offset by other revenue gains in order for the program to continue.[51] To achieve such revenue gains Congress intended that BPA supply the DSI first quartile with nonfirm power, which produces additional revenue for BPA at no added cost.[52] This revenue is used to insure that the residential rate subsidy program continues.[53] BPA cannot obtain this needed revenue by selling nonfirm power to

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[50]16 U.S.C. § 839c(c). *See* DSI Brief at 15-18.

[51]Because the Regional Act constrains BPA's ability to recoup its loss by charging higher firm power rates to preference utilities, 16 U.S.C. § 839e(b)(2), BPA must offset this loss with gains from other power sales or impose surcharges that can terminate the residential subsidy program. 16 U.S.C. §§ 839e(b)(3), 839c(c)(4).

[52]By "squeezing" from its existing hydro system the power used to serve the DSI top quartile, BPA effectively incurs firm power costs for only three quartiles of the DSI load while obtaining four quartiles of power revenues from DSI rate payments. *See, e.g.*, 16 U.S.C. § 839c(c)(1). *See also* Letter of BPA Administrator to Hon. Abraham B. Kazen, Jr. ("Kazen Letter") (Aug. 19, 1980), VIII COR 2335 [Cert. A., at I-2 to I-3]; DSI Brief at 10 & n.19, 17-18, 47-48 n.120.

[53]Any increase in nonfirm service to the DSI first quartile increases BPA's revenues without increasing BPA's costs, and thus reduces the risk of surcharges. *See Senate Report*, at 60-62 [Cert. A., at F-76 to F-80] ("lower DSI loads" will tend to produce the surcharges that jeopardize the subsidy program). *See also* DSI Brief at 46-48.

Respondents because Respondents make no contribution whatsoever to the rate subsidy program from their purchases of nonfirm power.[54]

2. Sale of Nonfirm Power to Preference Utilities Cannot Achieve the Regional Benefits Congress Intended

In disputing the economic and operational benefits of DSI service for all ratepayers, Respondents contradict both their own testimony[55] and BPA's formal presentations to Congress.[56] Only the DSIs receive nonfirm power in combination with firm power borrowed from their own future

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[54]BPA does not currently collect any of the program's costs from the sale of nonfirm power to utilities. BPA, *Administrator's Record of Decision, 1982 Wholesale Power Rate Decision 110* (Aug. 1982). Moreover, while BPA does collect a portion of those costs from *firm* power sales to utilities, 16 U.S.C. § 839e(b)(1), Respondent Central Lincoln's claim that preference utilities will contribute $250 million to the program in the coming year, CL Brief at 10, is blatantly misleading. This figure represents the program's "gross" cost to all utilities, preference and nonpreference alike; the preference utilities' net contribution to the program is only a small fraction of this total. BPA, *1983 Final Rate Proposal, Wholesale Power Rate Design Study* (Sept. 1983). *See also* 16 U.S.C. § 839e(b)(2)(C) (establishing a rate "ceiling" specifically limiting the program's impact on preference utility rates).

[55]The Manager of Respondent PPC told Congress:

> "Under existing statute [sic] it seems clear that the power presently being sold to BPA's direct service industrial customers will be sold to the public agencies when the DSI contracts expire. . . . It is not reasonable or rational or in anyone's best interest to terminate those loads. Legislation is necessary to allow BPA to continue serving those customers and is a necessary condition if the regional system is to continue receiving the benefits brought about by their contracts."

Pacific Northwest Electric Power Issues: Hearing on H.R. 13931 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 544 (1978) (statement of David Piper).

[56]*See, e.g.*, Kazen Letter, VIII COR 2339-2340 [Cert. A., at I-9] *quoted in* DSI Brief at 10 n.19.

service, which permits reservoir operations that increase BPA's total power production.[57]

Respondents do not deny that preference utilities arbitrage nonfirm power to other utilities at higher prices.[58] However, Respondents claim that they can develop beneficial uses for this power: to provide "backup" for their own power plants, displace oil and gas in industrial boilers, and increase irrigation pumping loads. The short answer is that the Regional Act neither commits nonfirm power to preference utilities nor countenances the interruption of DSI loads for these uses.[59]

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[57]*See* DSI Brief at 7-10, 31-34, 46-48; remarks of BPA Power Manager, Dec. 11, 1980, I COR 254-62; Redman, *Nonfirm Energy and BPA's Industrial Customers*, 58 WASH. L. REV. 279, 282-85 (1983). Respondents would do well to consider the substance of this article rather than fulminate about its origin.

Moreover, nonfirm power sales to other entities cannot provide the same quality reserves as sales to the DSIs. For example, DSI nonfirm power can be interrupted instantaneously without the one-hour notice normally provided Respondents, *see, e.g.*, BPA's Proposed Policy: Nonfirm Energy Sales for Utilities' Industry Loads (48 Fed. Reg. 33,518, 33,524) (1983), and provides reserves that BPA could otherwise obtain only with standby generators. EIS, *supra* n.6, at IV-87.

[58]Respondents argue that they use BPA nonfirm power for their own loads and not for resale to other utilities, because the direct resale of federal power is prohibited. CL Brief at 9 n.25. Respondents do not deny, however, that they use BPA nonfirm power to displace their own power, which they then resell. This practice squarely fits the dictionary definition of arbitrage: the simultaneous purchase and sale of the same or equivalent goods in order to profit from price discrepancies.

[59]*See* pp. 10-13 *supra*. Reliance on nonfirm power as "backup" would breach the Northwest utilities' Coordination Agreement and flout the Regional Act's express provisions. *See* DSI Brief at 47 n.118. Respondents' other uses were first proposed only after passage of the Regional Act. *See* BPA's Nonfirm Energy Sales Policy, *supra* n.57, and BPA's Final Action on Short-Term Sale of Nonfirm Energy to Utilities for Irrigation Loads (48 Fed. Reg. 38,533) (1983); Int'l Paper Co. Brief at 3-4. *See also*, Northwest Power Planning Council,

Finally, Respondents' contention that BPA's operation in conformance with the Ninth Circuit's Opinion has occasioned no harm barely merits response; that BPA has had sufficient nonfirm power to serve all customers during this period does not diminish the harm that the DSIs will suffer if their power is interrupted for purposes not authorized by Congress during the life of these twenty year contracts.[60]

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Northwest Conservation and Electric Power Plan 5-12 (1983) (although promoting new uses for BPA's nonfirm power, Council "does not mean to imply that [DSI nonfirm] service should be subordinated to new interruptible uses").

[60]Respondents' assertion that the DSIs can readily obtain other power whenever interrupted by BPA is without foundation. *Pacific Northwest Electric Power Supply and Conservation: Hearings on H.R. 9020, H.R. 9664 and H.R. 5862 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, 95th Cong., 1st Sess. 127-65 (1977) (BPA statistics).